80-1145

No. ———

Supreme Court, U. S.
FILED
JAN 8 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

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AID INSURANCE COMPANY (MUTUAL), ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

———o———

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QUESTION PRESENTED

Whether the Flood Control Act of 1928, 33 U.S.C. § 702c, grants a blanket immunity to the government for its grossly negligent conduct which was the sole cause of the failure of the Teton Dam in Southeastern Idaho and requires a dismissal of all complaints as a matter of law.

PARTIES APPEARING IN THIS PETITION

This petition for a writ of certiorari is filed on behalf of the following petitioners who appeared as plaintiffs in the proceedings below: Aid Insurance Company (Mutual), Amco Insurance Company, American Economy Insurance Company, Insurance Company of North America, Recovery Services International, Foremost Insurance Company, John Deere Insurance Company, Tahoe Insurance Company, National General Insurance Company, Balboa Insurance Company, Millers Mutual Fire Insurance Company of Texas, Guaranty National Insurance Company, American Bankers Insurance Company of Florida, Farm Bureau Mutual Insurance Company of Idaho, Mid-America Fire and Marine Insurance Company, Allstate Insurance Company, Allstate Indemnity Company, United Pacific Insurance Company, Reliance Insurance Company, The Travelers Indemnity Company, The Travelers Indemnity Company of Rhode Island, The Charter Oak Insurance Company, North Pacific Insurance Company, Oregon Automobile Insurance Company, Universal Underwriters Insurance Company, Oregon Mutual Insurance Company, Centennial Insurance Company, National Farmers Union Property and Casualty Company, Old Reliable Fire Insurance Company, Horace Mann Insurance Company, Aetna Insurance Company, Florist's Mutual Insurance Company, Great American Insurance Company, Auto-

mobile Club Insurance Company, American Fidelity Fire and Insurance Company, American Modern Home Insurance Company, The Hartford Accident and Indemnity Co., Farmers Insurance Company of Idaho, Mid-Century Insurance Company, Truck Insurance Exchange, Farmers Insurance Exchange, Industrial Indemnity Insurance Company, United States Fire Insurance Company, Nationwide Insurance Company, Transamerica Insurance Company, Unigard Insurance Company, Unigard Mutual Insurance Company, Emmco Insurance Company, American Hardware Mutual Insurance Company, Summit Home Insurance Company, Liberty Mutual Fire Insurance Company, Milbank Mutual Insurance Company, Safeco Insurance Company of America, General Insurance Company of America, Fireman's Fund Insurance Company, National Surety Corporation, The American Insurance Company, West American Insurance Company, J. R. Rokeby-Johnson on behalf of those Underwriters at Lloyd's, London and British Companies signatory to Policy No. 3066021, J. R. Rokeby-Johnson on behalf of those Underwriters at Lloyd's, London and British Companies signatory to Policy No. 5871026, United States Fidelity and Guaranty Company, State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, State Farm General Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., Harco National Insurance Company, St. Paul Fire and Marine Insurance Company, and Aetna Life and Casualty. The remaining plaintiffs in the proceedings below will file separate petitions for a writ of certiorari with this Court.

A listing of all parent companies, subsidiaries and affiliates of each plaintiff, as required by Rule 28.1, is set forth in Appendix G.

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In The

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AETNA INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

———o———

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a) is reported at 628 F. 2d 1201 (9th Cir. 1980). The order of the court of appeals denying the petition for rehearing and rejecting the suggestion for a rehearing en banc (App. B, 9a) is not yet reported. The opinion of the district court (App. C, 10a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. D, 16a) was entered on August 14, 1980. The order of the court of appeals denying the timely filed petition for rehearing and rejecting the suggestion for rehearing en banc was subsequently entered on October 14, 1980. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

STATUTES INVOLVED

The Flood Control Act of 1928, ch. 569, Section 3, 45 Stat. 534, 33 U. S. C. § 702c provides in part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . .

The Teton Dam Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211 (App. E, 17a-18a).

STATEMENT

1. This case results from the total failure of the massive Teton Dam in Southeastern Idaho. On June 5, 1976, the Bureau of Reclamation's Teton Dam collapsed while the reservoir was being filled for the first time. Construction on the 305 foot high dam was not yet completed, but the 17 mile long reservoir behind the dam was almost full when the dam failed. More than 288,000 acre feet of stored water exploded through the crumbling walls of the dam, inundating parts of five counties and destroying property as far as 70 miles downstream. At least eleven persons were killed and property worth hundreds of millions of dollars was destroyed.

2. The Teton Dam project was authorized by Congress as a reclamation project, under the supervision of the Secretary of the Interior and governed by the federal reclamation laws. The enabling legislation, Pub. L. No. 88-583, 78 Stat. 925, specifically identified only four purposes for the project: irrigation, power, recreation and conservation. No mention whatsoever is made in the legislation of flood control and the dam was not constructed pursuant to nor was it to be operated under the flood control laws.

3. The Teton Dam was the first reclamation project dam constructed and operated by the Department of the Interior to completely fail. In response, Congress quickly passed the "Teton Dam Assistance Act of 1976," Pub. L. No. 94-400, 90 Stat. 1211, and appropriated $400,000,000.00 to "fully compensate any and all persons for the losses sustained by reason of the failure of said dam." This special legislation provided direct compensation to injured

parties in addition to the usual disaster benefit programs made available by the federal government. Although the legislation stated that it was enacted "without regard to the proximate cause of the failure of the Teton Dam," the Act constituted a full and complete acceptance by the government of financial responsibility for damages caused by the failure of the dam.

4. Adding to its unusual nature, the Assistance Act provided that insurance carriers could not submit insurance subrogation claims for damages resulting from the failure of the Teton Dam. However, the Act specifically provided that this limitation would not prevent an insurance subrogee from "exercising any right of action against the United States to which it may be entitled under any other laws for payments made to the claimant. . . ." *Id.*, Sec. 3 (f).

5. This case was initiated with the filing of some 47 lawsuits by insurance companies seeking approximately $12,000,000.00 from the United States in reimbursement of claims paid to insureds who were injured by the failure of the Teton Dam. The lawsuits were consolidated into a single proceeding by the order of the district court on September 28, 1978. The lawsuits uniformly allege that *the sole cause of the failure of the Teton Dam* was the extremely careless and negligent conduct of the government and its agents in designing, constructing, and operating the Teton Dam. The allegations, based in part on the conclusions of detailed reports from the General Accounting Office, Department of Interior, and the Independent Panel to Review Cause of Teton Dam Failure, show that not only did the government violate well established industry standards, it frequently violated its own

published standards and construction specifications.[1] Of the numerous alleged acts of negligence, all of which are confirmed by the published reports of the government agencies, the following are a sample:

(a) Failure to follow the government's own design specifications and industry standards in constructing the dam and filling the reservoir.

(b) Failure to grout and seal large cracks in the dam foundation, resulting in erosion and undermining of the dam.

(c) Failure to utilize proper materials and to install proper drains and inspection galleries, in violation of the government's own specifications.

(d) Failure to give adequate warning of the imminent failure of the dam, even though government officials had prior knowledge of the impending dam failure.

6. The government filed a motion to dismiss all complaints, claiming total and complete immunity from all damages resulting from the failure of the Teton Dam, even assuming that the sole cause of the failure of the dam was the gross negligence of the government. The government grounded its immunity claim on the provisions of the 1928 Flood Control Act, 33 U. S. C. § 702c.

7. The immunity issue was briefed extensively by both sides and on February 23, 1979, the district court

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1 The Executive Director of the Independent Review Panel, Robert B. Jansen, Assistant Commissioner for Dam and Structural Safety and Chairman of the U. S. Committee on Large Dams for the term 1979-80 has written a book entitled *Dams and Public Safety*, U. S. Government Printing Office, 1980, which candidly admits that governmental negligence was the sole cause of the failure of the Teton Dam. See Appendix F, 19a-20a.

entered its memorandum decision and order (App. C, 10a) denying the government's motion to dismiss. In its opinion, the district court made the following specific findings based on the limited record before the court:

> (a) 33 U. S. C. § 702c immunity does not apply to damages unconnected with flood control projects or wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control (App. C, 14a).
>
> (b) The Congress has "designated the Teton Basin Project a reclamation project rather than a flood control project and flood control was not enumerated among the purposes of the project . . ." (App. C, 14a).
>
> (c) There was no evidence before the court that "Congress expressly appropriated funds for flood control" or that "the Army Corps of Engineers supervised the Teton Basin Project or expended Congressionally appropriated funds for flood control on the project." (App. C, 14a).
>
> (d) There was no evidence before the court that "the alleged negligent conduct of the defendant through its agents was the result of any effort to control flooding at the time of the disaster." (App. C, 14a).

In summary, the district court found that the record before it on the motion to dismiss was devoid of any facts which would support the application of 33 U. S. C. § 702c to the claims of the plaintiffs as set forth in their complaints. The district court therefore denied the motion to dismiss, but certified its decision as suitable for interlocutory appeal pursuant to 28 U. S. C. § 1292 (b). The government's petition to the Court of Appeals for the Ninth Circuit for permission to appeal was granted.

8. On appeal, a three judge panel found in favor of the government and ordered the decision of the district

court reversed with instructions on remand to grant the motion to dismiss. The decision of the court of appeals was based on several sweeping conclusions:

(a) That the governmental immunity provided by 33 U. S. C. § 702c applies to any irrigation project in which flood control plays any part, even though the flood control purpose is not a major or important part of the project.

(b) That the Teton Dam Project had a flood control purpose because of arguments made by congressmen during the debate on the enabling legislation, even though the legislation itself makes no reference to flood control.

(c) That the immunity provisions of § 702c apply even to those situations in which the sole cause of the damage is governmental negligence, unaccompanied by any natural factors or actual flood conditions.

9. The petitioners filed a timely petition for rehearing and rehearing en banc before the court of appeals and that petition was denied by an order entered by the original panel of judges on October 14, 1980 (App. D, 9a). Subsequently, this petition for a writ of certiorari was timely filed.

REASONS FOR GRANTING THE PETITION

1. The Decision of the Court of Appeals Will Have a Severe Impact on the Rights of Citizens Injured by the Negligent Construction of Federal Reclamation Projects.

The broad decision of the court of appeals is that 33 U. S. C. § 702c grants a total immunity to the government

for its negligent conduct in constructing and operating reclamation projects if the project includes any incidental flood control benefits, without regard to whether the actual negligent conduct in question is related to a congressionally authorized flood control function. Inasmuch as all reclamation projects necessarily involve structures in streams of water and therefore always have some flood control impact or function, the effect of the decision is to grant total immunity to the government with respect to the construction and operation of all federal reclamation projects. For the first time, the government is granted *carte blanche* the right to construct reclamation dams without regard to safety or concern for the life and property of downstream residents.

This holding is of exceptional importance because no federal court has ever before held that § 702c applies to damages caused by the negligent release of waters from a defective reclamation project dam, even though such projects always have some incidental flood control benefits. The decision of the court of appeals on that issue is totally without precedent and extends the immunity provisions of § 702c far beyond its original purpose of encouraging the construction of flood control works on the Mississippi River by providing immunity when *"there is damage 'from' or 'by' a flood or flood waters in spite of and notwithstanding federal flood control works. . . ." National Mfg. Co. v. United States,* 210 F. 2d 263, 271 (8th Cir. 1954) (emphasis added).

The decision also extends complete governmental immunity to situations where there are no natural flood conditions of any type and the only cause of damages is

the release of impounded irrigation waters solely because of governmental negligence. If such a holding is permitted to stand, it is difficult to imagine any case in which the government will have any responsibility for its negligence in constructing and operating reclamation projects, regardless of how serious or flagrant that negligence may be.

2. The Decision Is In Conflict With Prior Decisions of The Same Circuit and Other Circuits.

The decision of the court of appeals should be reversed not only because it has a severe impact on the safe construction and operation of reclamation projects, but because it is in conflict with existing court of appeals' decisions on the scope and application of § 702c, including prior decisions within the Ninth Circuit itself.

Until the present case, there had never been a decision in any court of appeals holding that § 702c provided immunity for government conduct in constructing and operating a project unless both of the following factors were present: (1) Congress had explicitly designated flood control as one of the statutory purposes of the project; and (2) the negligent conduct had been funded by Acts of Congress authorizing the expenditure of federal funds for flood control. Until the present case, no court of appeals had ever applied § 702c to a reclamation project simply because one of the incidental benefits of the project was flood control.[2]

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2 *National Manufacturing Co. v. United States,* 210 F. 2d 863 (8th Cir. 1954); *Florida East Coast Railway Company v. United States,* 519 F. 2d 1184 (5th Cir. 1975); *Peterson v. United*

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The limited scope of § 702c is clearly illustrated in *Hayes v. United States*, 585 F. 2d 703 (4th Cir. 1978):

> "Since the purpose of § 702c was to insulate the federal government's activities in aid of flood control, after enactment of the Federal Tort Claims Act the reach of the § 702c immunity has been confined to damage from flooding which allegedly occurred because of the government's anti-flooding activity.
>
> "The plaintiff here alleged that the Kerr Scott Dam was a dual purpose dam designed to be operated as a flood control facility and to provide recreation for members of the public. . . . One may assume that all of the releases, or most of them, were incidental to the dam's operation as a flood control facility, but absolute dismissal on the basis of Rule 12 (b) (6) should not be premised upon mere assumption. It is not inconceivable that all or some of the releases were solely for the purpose of promoting recreational use of the impounded waters and not in the least in aid of the operation of the dam as a flood control facility. If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c." 585 F. 2d at 702.

In addition to the two common factors cited above, each prior case also involved either natural flood condi-

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States, 367 F. 2d 271 (9th Cir. 1966); *McClaskey v. United States*, 386 F. 2d 807 (9th Cir. 1967); *Stover v. United States*, 332 F. 2d 204 (9th Cir. 1964); *Clark v. United States*, 218 F. 2d 446 (9th Cir. 1954); *Callaway v. United States*, 568 F. 2d 684 (10th Cir. 1978); *Graci v. United States*, 456 F. 2d 20 (5th Cir. 1971); *Lenoir v. Porters Creek Watershed District*, 586 F. 2d 1081 (6th Cir. 1978); *Taylor v. United States*, 590 F. 2d 263 (8th Cir. 1979); *Lunsford v. United States*, 570 F. 2d 221 (8th Cir. 1977); *Hayes v. United States*, 585 F. 2d 703 (4th Cir. 1978).

tions alone, or natural flood conditions and governmental negligence together. Not a single case involved the situation presented by the Teton Dam disaster in which extensive acts of governmental negligence were the sole cause of flooding.

In the instant case, the trial court found that the Teton Dam Project was not authorized by Congress as a flood control project and that there was no evidence that the negligent conduct of the government was the result of any effort to control flooding. Furthermore, the record showed that the sole cause of the flooding was the negligent conduct of the government, without any natural flooding conditions. The decision of the court of appeals to apply the immunity provisions of § 702c to the Teton Dam failure stands alone in opposition to all existing precedent defining the scope of § 702c. This conflict justifies the granting of certiorari so that this Court can establish a uniform and consistent application of § 702c throughout the entire country.

3. The Decision of the Court of Appeals is Incorrect.

A. The Circuit Court May Not Judicially Insert a Purpose In the Authorization Act Congress Chose Not To Include.

The Teton Dam Authorization Act, Pub. L. 88-583, contains not one reference to flood control, either in the stated purposes or in the body of the Act. From beginning to end, the Act makes it clear that the project is a reclamation project and no reference is made to flood control. The Circuit Court, however, found a flood control purpose in the act because of the discussion of flood con-

trol benefits in congressional debate on the enabling legislation.

It is well established that nothing is more reflective of legislative purpose than the precise words of the statute. *Santa Fe Industries, Inc. v. Green,* 430 U. S. 462, 472 (1977). Although this Court has permitted a review of legislative history even if a statute appears plain and unambiguous upon a "superficial examination", *Train v. Colorado Public Interest Research Group,* 426 U. S. 1, 9-10 (1976), such cases have always involved interpretation and were never concerned with a request to make a judicial insertion directly into the purposes section of a statute. Under the holdings of this Court, a lower court cannot conclusively rely upon legislative history to declare an additional purpose to a law when the statute itself is plain and unambiguous on its face. *Iselin v. United States,* 270 U. S. 245, 250-51 (1926); *Kuehner v. Irving Trust Co.,* 299 U. S. 445, 449 (1937).

B. 33 U. S. C. § 702c Does Not Apply to Reclamation Projects Merely Because They Have Incidental Flood Control Benefits.

The court of appeals found that the Teton Dam was a reclamation project and that "flood control undisputably was not the exclusive purpose of the Teton basin project, and it may not have been a major purpose" (App. A. 14a). Nevertheless, the court of appeals held that *if flood control benefits are any part of a reclamation project* then the immunity provisions of § 702c apply. This holding completely misunderstands the purpose of § 702c and its relationship to the federal reclamation laws

33 U. S. C. § 702c was enacted as part of the nation's initial flood control laws. When this legislation was first enacted in 1928, it envisioned a vast network of dikes and levies to protect the populace from the frequent and destructive floods on the Mississippi and Missouri Rivers and their tributaries. In subsequent legislation the Army Corps of Engineers was specifically charged with the responsibility of flood control. 33 U. S. C. § 701b. The statute made it clear that the flood control activities of the Corps of Engineers were not to interfere with any reclamation projects undertaken by the Bureau of Reclamation. 33 U. S. C. § 701b.

Congress provided an entirely different mechanism for accomplishing reclamation purposes. Reclamation projects are under the jurisdiction of the Secretary of the Interior and are governed by an entirely different body of law. 43 U. S. C. § 371, et seq. The role of the government in reclamation projects is completely different from its role in flood control projects, which are undertaken "in a purely public capacity to forfend calamity". *Clark v. United States,* 109 F. Supp. 213, 228 (D. Oregon, 1952). Reclamation projects are undertaken by the government in its proprietary capacity in the same manner as construction of such works by private citizens and are not " . . . a necessary part of civil government in the same sense in which the protection of life, liberty and property . . . are." *Twin Falls Canal Co. v. Foote,* 192 F. 583, 594 (C. C. S. D. Idaho, 1911). Reclamation projects involve irrigation works that are built by the government on behalf of local irrigators. The cost of the project is usually assessed to and paid by the local irrigators. In a real sense, the government acts as the contracting agent

for the benefit of local citizens. Reclamation projects are elective in that they are built primarily to provide a benefit, not to prevent a potential disaster.

It is of great importance to note that Congress enacted § 702c as part of its flood control legislation, and *did not include a similar immunity statute in the reclamation legislation, even though Congress knew that it was authorizing massive dams and reclamation structures that would necessarily provide some flood control benefits.* There are sound reasons why Congress chose to require immunity as a condition of engaging in flood control projects, but agreed to submit the government to liability for negligence in constructing and operating reclamation projects. In the flood control situation, the government is engaging in a public project designed to protect against *a calamity that will inevitably occur.* The Army Corps of Engineers must decide on the optimum protection that can be provided against floods, fully recognizing that eventually natural conditions will be such that flooding will occur in spite of the flood control project. Because reclamation projects are elective in nature, they need not be constructed unless they can be erected in a safe manner. It is not unreasonable for the beneficiaries of such a project and the citizens living near it to require the government to construct the project in a non-negligent manner. It is for this reason that the reclamation laws contain no counterpart to § 702c.

By law, the Secretary of the Interior is required to make a report to the President and to Congress on all proposed reclamation structures and allocate the construction and operation costs and benefits of the project to ir-

rigation, power, flood control, and other related purposes. 43 U. S. C. § 485h. The fact that the Secretary of the Interior allocates small portion *of the benefits of a reclamation project* to flood control or that congressmen acknowledge such flood control benefits does not cause the project to become a flood control project and subject to the immunity provisions of § 702c. To the contrary, 33 U. S. C. § 701b provides that the overall grant of flood control authority to the Army Corps of Engineers should specifically "not interfere with investigations and river improvements incident to reclamation projects that may now be in progress or may hereafter be undertaken by the Bureau of Reclamation. . . ."

The Congress carefully constructed a system of laws dealing with both flood control and reclamation projects. When Congress specifically designates a project as a flood control project, then it comes under the jurisdiction of the Army Corps of Engineers and flood control laws apply. When Congress designates a project as a reclamation project, then it comes under the jurisdiction of the Secretary of the Interior and the reclamation laws apply. Congress did not include any immunity provisions in the reclamation laws, even though it knew that the reclamation projects involved some flood control benefits and that the Secretary of the Interior was obligated by law to allocate some portion of the benefits of each project to flood control.

In the instant case, the Congressional reports on the Teton Basin Project show that flood control played a minimal part in the project, it being estimated by the Department of the Interior that flood control would constitute

only 7.9% of the annual benefits of the project, while irrigation, power, and recreation would account for 92.1% of the annual benefits. House Document No. 208, 88th Cong. 2d Session, p. XIV. Similarly, the Interior Department allocated only 1.5% of the annual operating costs of the project to flood control while allocating 98.5% of the operating costs to other benefits. House Document No. 208, *supra,* p. XIV. The history of the Teton Basin Project clearly shows that any flood control benefits were minimal and were only those incidental to all standard reclamation projects.

Petitioners' position that reclamation projects are not subject to § 702c merely because of the existence of incidental flood control benefits is supported by the decision of this Court in *United States v. Gerlach Livestock Company,* 339 U. S. 725 (1950). In that case the government asked this Court to find that the Friant Dam was a navigation project so that Gerlach's riparian lands would be subject to the federal navigation servitude. Similar to its argument in this case, the government claimed that the project was a navigation project because it involved some incidental navigation benefits.

This Court determined that the Friant Dam project had been approved by Congress as a reclamation project and that it would be considered a reclamation project, regardless of other incidental benefits:

> Even if we assume, with the Government, that Friant Dam in fact bears some relation to control of navigation, we think nevertheless that Congress realistically elected to treat it as a reclamation project. 339 U. S. at 739.

> . . . the effects on navigation are economically insignificant as compared with the values realized from redistribution of water benefits. 339 U. S. at 729.

Since Congress designated the Friant Dam a reclamation project, this Court treated it as such, regardless of the existence of other incidental benefits in the project. Likewise, Congress designated the Teton Dam a reclamation project and this Court should treat it as a reclamation project despite any other incidental benefits.

If the ruling of the court of appeals is permitted to stand, then every reclamation project with any flood control benefit, no matter how small, will be moved under the broad immunity provisions of § 702c of the Flood Control Act. Such a holding is without precedent and is an unsound policy for the reasons stated above.

C. 33 U. S. C. § 702c Does Not Provide Immunity When the Sole Cause of the Escape of Impounded Waters Is the Negligence of the United States.

The Teton Dam disaster is unique because it is the first time a major reclamation dam has totally failed as the sole result of governmental negligence without any other intervening causes. The various complaints allege and the official reports establish that the sole cause of the failure of the Teton Dam was the incredibly negligent conduct of the government and its agents in the design, construction, and operation of the dam.

Prior to the ruling of the court of appeals in this case, there had never been a federal court decision which on its facts applied § 702c immunity to the government when impounded waters escaped solely because of governmental negligence. To the contrary, every single prior

application of §702c involved a Congressionally designated flood control project in which damages resulted either from natural flood conditions, or a combination of natural conditions and governmental negligence. *See, e. g., Florida East Coast Railway Co. v. United States,* 519 F. 2d 1184 (5th Cir. 1975). (Severe rain and flood conditions).

The court of appeals sought to avoid the application of these earlier cases by arguing that "any flood caused by governmental negligence is also caused in part by the natural conditions extant at the time of the negligence: e. g., the amount of rainfall which preceded the flood and hence the amount of water being stored." (App. A, 7a). Such reasoning is totally without merit. It is akin to arguing that the rupture of a water pipe is due to an Act of God because the water in the pipe comes from rainfall out of the heavens. The liability issue in question is not determined by the source of the stored water, *but from the cause of the release of the stored water.* In the instant case the record is clear that there were no natural causes of the failure of the Teton Dam and that the amount of water stored was well within the design limits of the dam. The sole cause of the failure of the dam was the negligence of the government and its agents.

To apply § 702c to a dam failure caused solely by the negligence of the government ignores the purpose of § 702c and makes the Federal Tort Claims Act, 28 U. S. C. § 2671 et seq., a nullity. Congress enacted § 702c to provide immunity when there was damage from natural conditions and floods "in spite of and notwithstanding federal flood control works". *National Mfg. Co., supra,* at 271. The Federal Tort Claims Act was enacted to impose liability upon the government for its negligent conduct in constructing and operating reclamation projects.

The legislative history of the FTCA, which was enacted after § 702c, makes it apparent that Congress did not believe that § 702c constituted an effectual bar against all actions arising from governmental negligence in flood control projects. Citing examples of exempt activities under 28 U. S. C. § 2680, the Congress listed:

> . . . *flood-control or irrigation projects where no negligence on the part of the government agent is shown.* . . ." H. R. Rep. No. 2245, 77th Cong. 2d Sess. 10 (1942) (emphasis added)

The language clearly implies that when the negligence of a government agent is shown in a flood-control or irrigation project, then liability exists under the Act.

Although Congress specifically intended that the government not be liable for policy decisions to construct flood control works, it likewise anticipated that the government would be liable for flooding caused solely by the negligent conduct of government agents. The only two federal courts to directly face the issue on their facts both held that § 702c was inapplicable when the sole cause of water damage was governmental negligence. In *Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp.*, 126 F. Supp. 406 (N. D. Cal. 1954) the court held:

> Upon careful consideration of the background of the quoted section (702c), this Court is of the opinion that its purpose was to prevent the Government from being held liable for the staggering amount of damage caused by natural floods, merely because the Government had embarked upon a vast program of flood control in an effort to alleviate the effect of floods. . . .
>
> . . . the purpose of the enactment in question was to avoid financial liability being placed on the Federal Government for "Act of God" disasters, because of the enormous damage which results - - - often running into the millions of dollars. *It seems plain*

> *that Congress did not intend to disclaim Federal liability for water damage of every conceivable kind, but rather to exempt the Government for damage resulting only from events that could properly be described as floods. Liability in the case at bar turns upon a proper interpretation of the term "floods or flood waters" found in Section 702c.* (Emphasis added.)

In *Valley Cattle Co. v. United States*, 258 F. Supp. 12 (D. Hawaii, 1966) the court held:

> . . . § 702c does not apply to 'man-made floods' which result *solely* from negligent acts. (Citation omitted.)
>
> . . . If the inundation or 'flooding' of plaintiff's pens was not ipso facto the result of climatic or 'storm' conditions, but was rather *caused by the negligent acts of government agents at an operational level, then § 702c has no application* and plaintiff may properly urge recovery under the Federal Tort Claims Act. . . . 258 F. Supp. at 16-17. (Emphasis added.)

The decision of the court of appeals in the instant case is incorrect because it applies the immunity provisions of § 702c to all cases where stored waters escape, even when the sole cause of the escape of the waters is governmental negligence. Such a decision renders the Federal Tort Claims Act inapplicable whenever stored irrigation waters escape because of negligent conduct. Such was not the intent of Congress.

D. The Teton Dam Disaster Assistance Act Implicitly Recognized That 33 U. S. C. § 702c Does Not Apply.

The Teton Dam Disaster Assistance Act of 1976 (App. E, 17a), prohibits insurance carriers from submitting insurance subrogation claims, but the act specifically provides that this limitation shall not prevent an insurance subrogee from "exercising any right of action against the

United States to which it may be entitled under any other laws for payments made to the claimant. . . ." *Id.*, Sec. 3 (f). This provision would not have been inserted in the Assistance Act had Congress understood § 702c to constitute a complete bar against any claims for damages caused by the escape of waters impounded behind the Teton Dam. Had Congress understood § 702c to completely immunize the government against claims resulting from the collapse of this reclamation dam, the insertion of such a provision would have been meaningless.

Moreover, the Assistance Act makes no reference to "floods" or "flooding," but speaks only in terms of compensating for damages caused by the failure of the Teton Dam and explicitly recognizes and categorizes the Teton Dam as a reclamation project. Although the Assistance Act denies insurance carriers the automatic benefits provided to claimants under the Act, it specifically recognized their right to attempt to establish a claim under the Federal Tort Claims Act. The executive branch should not now be permitted to claim an immunity the legislative branch felt was inapplicable.

4. 33 U. S. C. § 702c Applies Solely to Mississippi River Flood Control Projects.

Petitioners contend that § 702c, enacted in 1928, applies only to flood control projects on the Mississippi River. As originally enacted in 1928, § 702c was limited in its application to Mississippi River projects. In *National Mfg. v. United States,* 210 F. 2d 263 (8th Cir. 1954) the court concluded that the language of § 702c had been adopted in the 1936 Flood Control Act, 33 U. S. C. § 701a et seq., and made applicable to all flood control projects throughout the country. Subsequent opinions of other courts of appeal

uniformly adopted that decision, without examining the validity of the Eighth Circuit opinion. *See, e. g., Clark v. United States,* 218 F. 2d 445 (9th Cir. 1954).

In fact, a careful review of the language of the two acts and their legislative history shows that Congress did not intend § 702c to be included as part of the 1936 Act and that the decision in *National Mfg.* is in error. The language of the 1936 Act does not incorporate the 1928 Act, but merely makes it clear that the 1928 Act is not repealed by implication. The 1936 Act did not extend the coverage of § 702c to other flood control projects, but in fact continued its application solely to the Mississippi River.

Like a widely read bad translation, *National Mfg.'s* erroneous conclusion that § 702c is applicable to all flood control projects throughout the country has dissuaded other courts from making a comprehensive review of the 1928 and 1936 statutes. We ask this Court to make just such a careful review, for as Mr. Justice Frankfurter noted, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late". *Henslee v. Union Planters Bank,* 335 U. S. 595, 600 (1949). The importance of the immunity provision of § 702c and its frequent application to flood control project accidents supply ample reason for a review of this issue by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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January 7, 1981

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 79-7219

AETNA INSURANCE COMPANY, ET AL.,

Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

OPINION

(Submitted March 6, 1980)

Appeal from the United States District Court
for the District of Idaho

Before: TANG, SCHROEDER and POLLE,
Circuit Judges

SCHROEDER, Circuit Judge:

This is an action by insurance companies against the United States Government to recover more than $7,000,000 in claims paid to insureds as a result of the 1976 collapse of the Teton Dam. The sole issue presented in this interlocutory appeal is whether the suit is barred by the provisions of 33 U. S. C. § 702c, which immunizes the United States from liability for flood damage related to flood control projects. The district court certified this appeal from its order denying the Government's motion to dismiss. We accepted the appeal and now hold that the district court's order must be reversed because the United States is immune.

Congress authorized the construction of the Teton Dam in 1964 in the wake of serious flooding which occurred in 1962. The dam was part of the Bureau of Reclamation's Teton Basin Project authorized by Pub. L. No. 88-583, 78 Stat. 925 (1964), 43 U. S. C. § 616nn-616rr. The enabling legislation's preamble stated multiple purposes for the project which did not expressly include flood control. However, the legislative history of the Act makes it clear that the project was at least in part intended to prevent the type of floods which had occurred in 1962. The project came to a tragic end, however, on June 5, 1976, when the partially completed dam collapsed, causing severe flooding and great damage in Idaho's Teton Basin.

Congress responded by enacting the Teton Dam Disaster Assistance Act of 1976. Pub. L. No. 94-400, 90 Stat. 1211 (1976). The Act provided direct compensation to injured parties but expressly excluded claims of insurance carriers for reimbursement of claims paid to their insureds. *Id.*, § 3 (d), 90 Stat. at 1211. The Act further provided that an insurer could exercise "any right of action against the United States to which it may be entitled under any other laws for payments made to [insureds]. . . ." *Id.*, § 3 (f), 90 Stat. at 1212. *See also id.*, § 9 (c), 90 Stat. at 1214.

The plaintiff insurance companies in this case acknowledge that they have no claim under the Teton Dam Disaster Assistance Act, but they do claim entitlement to recovery against the Government under another law, namely the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b), 2401 (b), 2671-2680. They filed this action as subrogees of their insured's claims against the Government, alleging that the

Government's design and construction of the dam was negligent and that the Government's negligence caused the dam's collapse.

The Government argues that the complaint should be dismissed because the United States is immune from liability under 33 U. S. C. § 702c, which provides:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place. . . .

Despite the broad language of the immunity statute, it is by now well settled in this Circuit that the immunity statute applies only when the flood damage is caused by a project related to flood control, and that it does not apply when the flood damage is "wholly unrelated to any act of Congress authorizing expenditure of federal funds for flood control . . ." *Peterson v. United States,* 367 F. 2d 271, 275 (9th Cir. 1966). *Accord Graci v. United States,* 456 F. 2d 20 (5th Cir. 1971), *cert. denied,* 412 U. S. 928 (1973). The question before us thus narrows to whether the flood damage here was related to government flood control activities so as to fall within the immunity provisions as they have been interpreted by the court.

Flood control undisputably was not the exclusive purpose of the Teton Basin Project, and it may not have been a major purpose. This Court has held, however, that damage as a result of flooding from a government project fell within the immunity provision of § 702c despite the fact that the project was not exclusively devoted to flood control. *McClaskey v. United States,* 386 F. 2d 807 (9th Cir. 1967). Section 702c has frequently been applied to floods stemming from multipurpose projects. *E. g., Taylor v.*

United States, 590 F. 2d 263 (8th Cir. 1979); *Lenoir v. Porters Creek Watershed District,* 586 F. 2d 1081 (6th Cir. 1978); *Callaway v. United States,* 568 F. 2d 264 (10th Cir. 1978). Nor does it matter, as plaintiffs suggest, whether the projects are administered by the Corps of Engineers, *e. g., McClaskey v. United States, supra,* the Bureau of Reclamation *e. g., Sanborn v. United States,* 453 F. Supp. 651 (E. D. Cal. 1977); *Hedrick v. United States,* 184 F. Supp. 927 (D. N. M. 1960), or the Department of Agriculture, *e. g., Lenoir v. Porters Creek Watershed District, supra.* The policy behind § 702c, was to permit the government to engage in a "vast construction program . . . of dikes, dams, levees, and related works," *Peterson, supra* at 275-76. That purpose would not be furthered by limiting the immunity to single purpose flood control projects, or even to projects in which flood control is a dominant goal.

The insurers assert, however, that flood control was not at all a purpose of the Teton Basin Project. They ask us to ignore the extensive legislative history indicating that flood control was very much on the minds of the members of Congress in passing the legislation. *See, e. g.,* H. R. Rep. No. 1715, 88th Cong., 2d Sess. at 3 (1964) ("The disastrous flood of February 1962 dramatically reemphasized the need for the construction proposed.") The insurers would have us focus narrowly on the purposes listed in the preamble to the Act which, for some unexplained reason, omitted flood control. The insurers' position in this regard is, however, contrary to the approach which the courts have taken in focusing, not upon the language of the legislation authorizing projects, but upon whether the project was actually intended, at least in part, to control flooding. Flood control was beyond

question a purpose of the Teton Basin Project. Indeed, this Court has specifically said in another context that one of the purposes of the Teton Basin Project was flood control. *Trout Unlimited v. Morton,* 509 F. 2d 1276 (9th Cir. 1974).

The insurers also argue that § 702c, which was enacted in 1928 in connection with an extensive project to control flooding on the Mississippi River, was intended to apply only to projects on that river, and that the Teton Basin Project is therefore outside its scope. This argument has been raised and rejected many times, and every court to consider the issue has held that § 702c has nationwide application. *E. g., Clark v. United States,* 218 F. 2d 446 (9th Cir. 1954); *Lenoir v. Porters Creek Watershed Dist., supra,* at 1086; *National Mfg. Co. v. United States,* 210 F. 2d 263 (8th Cir.), *cert. denied,* 347 U. S. 967 (1954). After 26 years of consistent interpretation, it would be the proper function of Congress and not this Court to narrow the scope of the immunity.

The insurer's remaining arguments focus not on the purpose of the Teton Basin Project but on the nature of the disaster which occurred. The insurers contend that the collapse of the dam with its ensuing flood damage was caused solely by government negligence unaccompanied by any unusual natural factors, and that 702c should not bar recovery in those circumstances. Its principal support for that position is dictum in *Stover v. United States,* 204 F. Supp. 477 (N. D. Cal. 1962), *aff'd,* 332 F. 2d 204 (9th Cir.), *cert. denied,* 379 U. S. 922 (1964). In this Court's affirmance, however, we expressly disapproved the trial court's dictum that [illegible] would not apply to floods

caused purely by negligence. The dictum has also been disapproved in other decisions. *See Burlison v. United States,* No. 79-2023, slip op. (8th Cir. July 11, 1980); *Lunsford v. United States,* 570 F. 2d 221 (8th Cir. 1977); *Florida East Coast Railway Co. v. United States,* 519 F. 2d 1184 (5th Cir. 1975); *Sanborn v. United States,* 45 F. Supp. 651 (E. D. Cal. 1977). Any flood caused by government negligence is also caused in part by the natural conditions extant at the time of the negligence: e. g., the amount of rainfall which preceded the flood and hence the amount of water being stored. To attempt to distinguish between ordinary and unusual natural conditions, as plaintiffs urge, would be a very difficult task. Such an inquiry would necessarily frustrate section 702c's purpose of permitting the government to engage in flood control without fear of liability. We agree with the Eighth Circuit that such a test would "lead the court into the morass of 'contributing causes,' 'superseding cause,' and 'intervening causes.'" *Lunsford, supra,* at 228 n. 13, quoting *Lunsford v. United States,* 418 F. Supp. 1045, 1054 (D. S. D. 1976). For similar reasons we reject the insurers' contention that the Teton Dam Disaster was not a "flood" within the meaning of 702c. The immunity provision is not limited to water damage attributable to a natural disaster. *See Florida East Coast Railway Co. v. United States, supra.*

Plaintiffs also argue that since at the time the immunity statute was passed, some twenty years before the Federal Tort Claims Act, there was no governmental liability for negligence, the immunity statute could not have been intended to provide immunity for negligent conduct in connection with flooding. An equally compelling argu-

ment can be made, however, that given the existing broad language of the immunity provision, Congress in passing the Federal Tort Claims Act should have manifested an intent to include flood damage arising out of negligence within the scope of the Federal Tort Claims Act. The legislative history is at best equivocal and the matter has been resolved for our purposes by repeated decisions of this Court which have held that 702c bars suits based on negligence. *McClaskey v. United States, supra; Stover v. United States, supra; Clark v. United States, supra.*

The order of the district court is reversed and the cause is remanded with instructions to grant the Government's motion to dismiss.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 79-7219

AETNA INSURANCE COMPANY, ET AL.,

Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

ORDER

Before: TANG, SCHROEDER and POOLE, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 78-4031

AETNA INSURANCE COMPANY, ET AL.,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

and consolidated cases

MEMORANDUM DECISION

All materials of record having been filed and reviewed and this matter having come regularly before the Court on February 12, 1979, for hearing on defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, it is the conclusion of the Court that defendant's motion to dismiss should be denied.

STATEMENT OF THE CASE

The failure of the Teton Dam on June 5, 1976, resulted in hundreds of millions of dollars of damage to the property of individuals and businesses in eastern Idaho. Plaintiffs are insurance companies whose insureds' property was among that damaged. Pursuant to insurance

policies between them and their insureds, plaintiffs have reimbursed their insureds for the losses that the latter suffered as a result of the Teton Dam disaster.

Congress responded to the Teton Dam failure by enacting the Teton Dam Disaster Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211, which recites the Government's purpose to compensate fully all deaths, personal injuries, and losses of property arising from the failure of the dam. Insurance companies, however, are explicitly excepted from recovery under the Act for the payments they have made to their insureds. The Act provides, however, that an insurance company can still exercise "any right of action against the United States to which it may be entitled under any other laws" for payments made to its insureds. Pub. L. No. 943-400, § 3(f), 90 Stat. at 1212.

Accordingly, plaintiffs instituted these suits pursuant to the Federal Tort Claims Act of June 25, 1948, 62 Stat. 982, 28 U. S. C. §§ 1346(b), 2671 *et seq.*, as amended. The United States of America responded to plaintiffs' suits in cases numbered 78-4031, 78-4032, and 78-4033 by filing its Rule 12(b) motion to dismiss, based upon the grounds that the court lacks jurisdiction over the subject matter of the action and that the complaints of the plaintiffs fail to state a claim upon which relief can be granted.

STATEMENT OF THE ISSUES

Defendant's motion to dismiss is grounded specifically upon the argument that plaintiffs' actions are barred by the provisions of Section 3 of the Flood Control Act of

1928, as codified at 33 U. S. C. § 702c, which provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place. . . .

The major issue before the Court is whether Section 702c immunity applies to the Teton Dam failure in the absence of any Congressional action designating the Teton Basin Project a flood control project.

DISCUSSION

Inasmuch as defendants have filed a motion to dismiss, the allegations of the plaintiffs' complaints must be taken as true for the purposes of the motion, *Miree v. DeKalb County,* 433 U. S. 25, 27 n.1 (1977), whether it be a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, *Walling v. Beverly Enterprises Corp.,* 476 F. 2d 393, 395-96 (9th Cir. 1973), or under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *California Dump Truck Owners Ass'n v. Associated General Contractors of America,* 562 F. 2d 607, 614 (9th Cir. 1977).

The Teton Dam Authorization Act of September 7, 1964, Pub. L. 88-583, contains no reference to flood control, either as published at 78 Stat. 925 or 43 U. S. C. §§ 616nn through 616rr. In the first sentence of that Act, Congress explicitly provided all the purposes of the Act, and declared in full:

> In order [1] to assist in the *irrigation* of arid and semiarid lands in the Upper Snake River Valley, Idaho, [2] to provide facilities for river *power* opportunities created thereby and, as incidents to the foregoing purposes, [3] to enhance *recreational* opportunities and [4] provide for the *conservation* and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Lower Teton division of the Teton Basin Federal reclamation project. 43 U. S. C. § 616nn (emphasis added).

A review of federal case law reveals that Section 602c immunity does not apply to damages "unconnected with flood control projects," *Graci v. United States,* 456 F. 2d 20, 27 (5th Cir. 1971), or "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control," *Peterson v. United States,* 367 F. 2d 271, 275 (9th Cir. 1966). Whenever a federal court has applied Section 702c, the project at issue was Congressionally designated a flood control project supervised by the Army Corps of Engineers. Despite the absence of flood control language in the authorization statute and the fact that Congress designated the Teton Basin Project a reclamation project and has not appropriated any federal funds specifically for flood control under the Authorization Act, the Government attempts to avail itself of Section 702c immunity by asking the Court to look to the pre-enactment legislative history where flood control was listed among the Project's purposes and insert flood control as a purpose in the Teton Dam Authorization Act. H. Rept. No. 1715, 88th Cong., 2d Sess., at 3 (1964). The Court finds the language of the Act to be clear and unambiguous in its statement of purposes. Moreover, a judicial insertion of flood control into the Authorization Act would not convert

a reclamation project into a flood control project. The Court is not inclined to insert language used in the preliminary legislative stages which was ultimately omitted from a bill in its approved and signed form. *Marshall Field & Co. v. Clark*, 143 U. S. 649 (1892).

Inasmuch as Congress designated the Teton Basin Project a reclamation project rather than a flood control project and flood control was not enumerated among the purposes of the Project, the Court must look for other reasons for applying Section 702c immunity to the Teton Dam disaster. There is no evidence before the Court that Congress expressly appropriated funds for flood control. Pub. L. No. 98-393, 88 Stat. 785, *Peterson v. United States, supra,* at 275. There is no evidence before the Court that the Army Corps of Engineers supervised the Teton Basin Project or expended Congressionally appropriated funds for flood control on the Project. *Id.* And finally, there is no evidence before the Court that the alleged negligent conduct of the defendant through its agents was the result of any effort to control flooding at the time of disaster.

In the absence of (1) Congressional flood control designation, (2) any express flood control purpose stated in the Authorization Act, (3) any Congressional flood control appropriation, (4) any expenditures or supervision by the Army Corps of Engineers, and (5) evidence that the water damage resulted from allegedly negligent conduct aimed at controlling flood waters on June 5, 1976, the Court finds no basis for Section 702c in order to bar defendant's potential liability. Had one of the above conditions been present, the Court may have reached a different result.

There are substantial arguments on each side of the question concerning the scope of application of Section 702c without any clear and controlling decisions by either the Ninth Circuit Court of Appeals or the United States Supreme Court. If the defendant were successful in appealing this decision, it would completely terminate all 35 actions consolidated before the Court in this matter. Therefore, it appears to the Court that this is a proper case to be certified for appeal pursuant to 28 U. S. C. § 1292 (b).

DATED this 23 day of February, 1979.

Marion J. Callister
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7219

DC CV 78-4031, et al., MJC

(Filed October 27, 1980)

AETNA INSURANCE COMPANY, ET AL.,

Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

APPEAL from the United States District Court
for the District of Idaho (Boise)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for

the ———— District of Idaho (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ———— judgment of the said District Court in this Cause be, and hereby is reversed and remanded, with instructions.

Costs in this court in favor of the appellant and against the appellees.

Costs:	
BRIEF FOR THE APPELLEES	$47.50
TOTAL	$47.50

Filed and entered August 14, 1980.
A TRUE COPY ATTEST
22 Oct. 1980 Richard H. Deane, Clerk of Court
by: Oscar Tagle, Deputy Clerk

APPENDIX E

The Teton Dam Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211:

> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the Congress finds that without regard to the proximate cause of the failure of the Teton Dam, it is the purpose of the United States to fully compensate any and all persons, for the losses sustained by reason of the failure of said dam. The purposes of this Act are (1) to provide just compensation for the deaths, personal injuries and losses of property, including the destruction and damage to irrigation works, resulting from the failure on

June 5, 1976, of the Teton Dam in the State of Idaho, and (2) to provide for the expeditious consideration and settlement of claims for such deaths, personal injuries and property losses.

Sec. 2. All persons who suffered death, personal injury, or loss of property directly resulting from the failure on June 5, 1976, of the Teton Dam of the Lower Teton Division of the Teton Basin Federal reclamation project which was authorized to be constructed by the Act of September 7, 1964 (78 Stat. 925) shall be entitled to receive from the United States full compensation for such death, personal injury, or loss of property. . . .

Section 3.

(a) . . .

(b) In determining the amount to be awarded under this Act, the Secretary shall reduce any such amount by an amount equal to the total of insurance benefits (except life insurance benefits) or other payments or settlements of any nature previously paid with respect to such death claims, personal injury, or property loss.

(c) Payments aproved by the Secretary under this Act on death, personal injury, and property loss claims, shall not be subject to insurance subrogation claims in any respect under this Act but without prejudice under other laws as provided in subsection (f).

(d) . . .

(e) . . .

(f) The acceptance by the claimant of any award, compromise, or settlement under this Act, except an advance or partial payment made under Section 4 (c), shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States by reason of the same subject matter. *A release shall not, however, prevent an insurer with rights as a subrogee under its own name or that of the*

claimant from exercising any right of action against the United States to which it may be entitled under any other laws for payments made to the claimant for a loss arising from the subject matter. (emphasis added)

APPENDIX F

The following excerpts are from the official government publication *DAMS AND PUBLIC SAFETY,* United States Government Printing Office: (1980)

Immediately following the dam's failure, the U. S. Secretary of the Interior and the Governor of Idaho joined in ordering an investigation and established for this purpose the Independent Panel to Review Cause of Teton Dam Failure. The Panel conducted a comprehensive study of the failure and concluded "(1) that the dam failed by internal erosion (piping) of the core of the dam deep in the right foundation key trench, with the eroded soil particles finding exists through channels in and along the interface of the dam with the highly previous abutment rock and talus, to points at the right groin of the dam, (2) that the exit avenues were destroyed and removed by the outrush of reservoir water, (3) that openings existed through inadequately sealed rock joints, and may have developed through cracks in the core zone in the key trench, (4) that, once started, piping progressed rapidly through the main body of the dam and quickly led to complete failure, (5) that the design of the dam did not adequately take into account the foundation conditions and the characteristics of the soil used for filling the key trench, and (6) that

construction activities conformed to the actual design in all significant aspects except scheduling.: The Independent Panel published its report "Failure of Teton Dam" in December 1976.

A second investigating team was the Interior Review Group (IRG) established by the Department of the Interior and composed of representatives of six Federal agencies. This group, supported by the forces of the Bureau of Reclamation, continued its studies throughout the period 1976 to 1979, extending the field excavations and testing to the left abutment. The Independent Panel had focused on the right abutment, where the failure occurred. However, the Panel also inspected the site in 1978 during final stages of the field investigation, and provided the views of its members on disclosures found on the left abutment. p. 200

* * *

The Interior Review Group, in addition to paralleling and extending the technical investigations by the Independent Panel, examined organizational and procedural factors that related to the Bureau's work on the project. The findings in its 1977 Report included:

"The design incorporated a feature, key trenches in the abutments, that significantly departed from past Bureau of Reclamation practices."

"The geometry of the abutment key trenches was conducive to developing stress patterns that could have allowed cracking of the impervious core."

"The narrow width of the sealed foundation rock at the bottom of the key trench, combined with the high per-

meability of the rock foundation on either side of the key trench, produced steep hydraulic gradients across the trench."

"Zone 1 compaction at the contact with foundation rock surfaces was generally equivalent to that within the body of the fill. Joints and fractures in the key trench walls were numerous, with openings up to 6 inches wide. There was little evidence of surface grouting in joints exposed in the key trench walls."

"Surface grouting stopped at El. 5205. Neither the designers nor the liaison engineer were aware of the decision to stop surface grouting until after the failure of Teton Dam. According to field personnel, the field geologists also played no part in the decision to stop surface grouting."

"The rock surface was not adequately sealed under the impervious core upstream and downstream from the key trench."

"The open fractures in the abutment foundation rock allowed direct access by reservoir water to the impervious core on the upstream side of the key trench. Any water flowing through the impervious core could exit into open fractures on the downstream side of the key trench."

"The laboratory tests, * * * confirmed the highly erodible nature of the zone 1 material and its brittle characteristics when compacted dry of optimum moisture content."

"The design failed to provide a defense against flow through embankment cracks or against erosion of the imprevious core at rock surfaces."

"Defensive measures were within the state-of-the-art of dam design at the time Teton Dam was designed, and should have been used."

"Design notes, developed early in the design process, identify and report a variety of potential design problems and possibly design alternatives. However, there are no records, documents, or reports that show: (1) the logical resolution of each of the identified design problems, (2) why a particular design alternative was considered satsifactory and selected in preference to others, and (3) why an identified design problem was subsequently judged important or not important and omitted from, or included for, further consideration." pg. 210.

* * *

In its summary, the Independent Panel concluded that the physical conditions were fully satisfied for water flowing under high pressure to attack the lower part of the key trench fill along open joints, some of which were found to transmit water freely through the grout curtain, particularly through the upper part near the grout cap. The attack was fully capable of quickly developing an erosion tunnel across the key trench. Arching at local irregularities, loose zones of fill at re-entrants, and local cracking may have contributed to the success of the attack and determined the precise location. Conditions were favorable for escape of the water and eroded solids into the joints of the rock downstream, for discharging the water against and along the interface of the right abutment of the dam and the embankment, and for development of the erosion features that ultimately breached the dam.

In the Independent Panel's words: "The precise combination of geologic details, geometry of key trench, variation in compaction, or stress conditions in fill and porewater that caused the first breach of the key trench fill is of course unknown and, moreover, is not relevant. The failure was caused not because some unforeseeable fatal combination existed, but because (1) the many combinations of unfavorable circumstances inherent in the situation were not visualized, and because (2) adequate defenses against these circumstances were not included in the design." pg. 212.

APPENDIX G

RULE 28.1 DISCLOSURE

Pursuant to Rule 28.1 the following disclosure is made of the parents, affiliates, and non wholly owned subsidiaries of the petitioners herein. This listing is not complete as to every party because of the large number of petitioners and affiliated companies. Research to identify additional related companies will continue and a supplemental listing will be filed at a later date.

American Bankers Insurance Company of Florida

American Bankers Insurance Group; American Bankers Insurance Company; American Bankers Life Insurance Company; Sureway Corporation.

Insurance Company of North America, and Recovery Services International

Life Insurance Company of North America; INA Reinsurance Company; INA Financial Corp.; INA Insurance Underwriters Insurance Company.

Foremost Insurance Company

Foremost Life Insurance Company; Foremost Service Corporation; Foremost Corporation of America; Minnehoma Insurance Co.; Minnehoma Life Insurance Co.; Centennial Park Hotel Corporation; Foremost Guarantee Corporation; Foremost Financial Services Co.; Foremost Home Brokers Inc.

John Deere Insurance Company and Tahoe Insurance Company

Deere and Co.; Deere John Co.; Deere John Credit Co.; Rock River Insurance Co.; Sierra General Life Insurance Co.; Continental Guarantee Limited (Bermuda).

National General Insurance Company

National Insurance Underwriters; American Telephone and Telegraph Co.

Balboa Insurance Company

Avco Financial Insurance Group; Meritplan Insurance Company; Provident Alliance Life Insurance Co.; Newport Insurance Company, London; Midland General Insurance Company; Hallmark Life Insurance Company Ltd.; Hallmark General Insurance Co., Ltd.

Millers Mutual Fire Insurance Company of Texas, Millers Casualty Insurance Company of Texas

The Millers Mutual Fire Insurance Company of Texas; The Millers Casualty Insurance Company of Texas; the Millers Life Insurance Company; Gibbons Hardwood Co.

Guarantee National Insurance Company

Guarantee National Corporation; Landmark American Insurance Company; Beneficial Corporation.

Farm Bureau Mutual Insurance Company of Idaho, and Mid-America Fire and Marine Insurance Company

American Agriculture Insurance Company; Farm Bureau Finance Co.; Farm Bureau Realty Co.; Farm Insurance Brokerage Co.; Farm Bureau Service Co.; Idaho Farm Bureau Federation; Western Farm Bureau Life Insurance Co.; Western Agriculture Insurance Co.

Allstate Insurance Company and Allstate Indemnity Company

Sears Roebuck & Co.; Allstate Enterprises, Inc.; Allstate Indemnity Company; Northbroock Excess and Surplus Insurance Co.; Northbroock Property & Casualty Insurance Co.; P.M.I. Mortgage Insurance Co.; Allstate International Inc.; Allstate Life Insurance Co.; Allstate Life Insurance Co. of Canada; Allstate Insurance Co. of Canada; under Allstate Enterprises Inc. are: Allstate Financial Corporation; Allstate Savings and Loan Association; Allstate Enterprises Mortgage Corporation; P.M.I. Mortgage Corporation; Allstate Motor Club Inc.; Schirmer Engineering Corporation; Homart Development Co.; Universal Rundle Corporation; Simpsons-Sears, Ltd.; Desota, Inc.; Kellwood Co.; Roper Corporation.

United Pacific Insurance Company and Reliance Insurance Company.

Pilot Insurance; General Casualty Co. of Wisconsin; Reliance Standard Life Insurance Company; United Pacific Life Insurance Company; Reliance Group Incorporated; CIT International Inc.; Commonwealth Land Title Insurance Co.; Reliance Consulting Group Inc.; Reliance Financial Services Corporation.

The Travelers Indemnity Company, The Travelers Indemnity Company of Rhode Island, and The Charter Oak Insurance Company

Travelers Insurance; Travelers Insurance Co.; The Travelers Indemnity Co.; The Travelers Life and Annuity Co.; The Travelers Life Insurance Co.; The Travelers Indemnity of Rhode Island; The Phoenix

Insurance Co.; The Charter Oak Fire Insurance Co.; The Travelers Investment Management Co.; Constitution State Management Co.; Constitution State Service Co.

North Pacific Insurance Company and Oregon Automobile Insurance Company

Armco Insurance Group, Inc.; NN Corporation; Morgan-Wightman Supply Co.; NN Dataforms, Inc.; The Northwestern National Insurance Group; American General Insurance Co.

Universal Underwriters Insurance Company

Universals Underwriters Inc.; Lynn Underwriting Co.; Universal Underwriters Insurance Co.; Universal Underwriters Life Insurance Co.; U. S. Epperson Underwriting Co.; L.I.G. Assurance Agency Inc. of Florida; L.I.G. Assurance Agency Inc. of Missouri; Lynn Insurance Agency Inc.; Universal Underwriters Lloyds.

Oregon Mutual Insurance Company

None.

Centennial Insurance Company

Atlantic Mutual Insurance Co.

National Farmers Union Property and Casualty Company

Baldwin-United Corporation; D. H. Baldwin Company; National Farmers Union Service Corporation; National Farmers Union Life Insurance Co.; National Farmers Union Standard Insurance; National Farmers Union Agency Inc. and more than one hundred affiliates.

Old Reliable Fire Insurance Company

Reliable Life Corporation; Old Reliable Casualty Co.

Horace Mann Insurance Company

Horace Mann Educators Corporation; Horace Mann Life Insurance Company; Horace Mann Insurance Company; Horace Mann Investors, Inc.; Horace Mann Fund, Inc.; Teachers Insurance Company; Educators Life Insurance Company; Educators Marketing services Corporation.

Aetna Insurance Company

Connecticut General Life Insurance Co.; Aetna Insurance Co.; Aetna Fire Underwriters Insurance Co.; Century Indemnity Co.; Connecticut General Insurance Corporation.

Florist's Mutual Insurance Company

Florist's Life Insurance Co.; Florist's Insurance Service Inc.; Florist's Insurance Co.

Great American Insurance Company

American Financial Corporation; K.C.C. Holding Corporation; American Contential Insurance Co.; Transport Management Corporation; TICO Insurance Co.

Automobile Club Insurance Company

Save - T - Risk Insurance Co.

American Fidelity Fire and Insurance Company

American Plan Corporation; American Consumer Insurance Co.

American Modern Home Insurance

Midland Company; American Farm Home Insurance Co.; American Western Home Insurance Co.; Main Life Insurance Co.; Western Preferred Corporation; American Western Life Insurance Co.; Early American Life Insurance Co.

The Hartford Accident and Indemnity Company

I T & T; Hartford Fire Insurance Co.; Abbey International Corporation; Abbey Life Insurance Co. Ltd.

Farmers Insurance Company of Idaho, Mid-Century Insurance Co., Truck Insurance Exchange, Farmers Insurance Exchange

Fire Insurance Exchange; Texas Farmers Insurance Exchange; Farmers New World Life Insurance Co.

Industrial Indemnity Insurance Company, U.S. Fire Insurance Co.

Crum and Forster; Floyd West and Co.

Nationwide Insurance Company

Nationwide Mutual Insurance Co.; Nationwide Mutual Fire Insurance Co.; Nationwide Life Insurance Co.; Nationwide General Insurance Co.; Nationwide Corporation; Pacific Life Insurance Co.

Transamerica Insurance Company

Transamerica Corporation; Wolverine Insurance Co.; Riverside Insurance Co.; Canadian Surety Co.; Automotive Insurance Co.

Unigard Insurance Company, Unigard Mutual Insurance Co.

Unigard Olympic Life Insurance Co.; Uunigard Indemnity Insurance Co.; Unigard Service Corporation.

Emmco Insurance Company

Excel Insurance Company; Gulf & Western Industries Incorporated.

American Hardware Mutual Insurance Company

None known.

Summit Home Insurance Company

American Reliable Insurance Co.; J. E. Murphy Co.; Consolidated Financial Corporation; Nicollet Village B & G Realty Co.; Greater Metro Bank Holding Co.

Liberty Mutual Fire Insurance Company

Liberty Mutual Insurance Co.; Liberty Life Assurance Company of Boston.

Milbank Mutual Insurance Company

None known.

Safeco Insurance Company of America and General Insurance Company of America

First National Insurance Company of America.

Fireman's Fund Insurance Company, National Surety Corp., The American Insurance Co.

Amex Holding Corporation; American Express Co.

West American Insurance Company

The Ohio Casualty Insurance Co.; American Fire & Casualty Co.; The Ohio Life Insurance Co.; Ohio Security Insurance Co.; Osasco Budget, Inc.

J. R. Rokeby-Johnson

On behalf of those Underwriters at Lloyd's London and British Companies signatory to Policy No. 3066-021 and Policy No. 5871026.

United States Fidelity and Guaranty Company

Fidelity and Guaranty Insurance Underwriters, Inc.

State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, State Farm General Insurance Company

(all subsidiaries including the following are wholly owned) State Farm Fire and Casualty Co.; State Farm General Insurance Co.; State Farm County Mutual Insurance Company of Texas; State Farm Life and Accident Assurance Co.; State Farm Life Insurance Co.

National Union Fire Insurance Company of Pittsburg, Pa.

Commerce and Industry Insurance; American International Company.

Harco National Insurance Company

International Harvester; Harco Holdings Inc.; International Harvestor Credit Corporation.

St. Paul Fire and Marine Insurance Company

St. Paul Companies Inc.; St. Paul Mercury Insurance Co.; The St. Paul Insurance Co.; St. Paul Guardian Insurance Co.; The St. Paul Insurance Company of Illinois.

Aetna Life and Casualty Company

Aetna Casualty and Surety Co.; Aetna Life Insurance Co.; COMSAT Company.

Aid Insurance Company (Mutual)

None.

Amco Insurance Company

American Economy Insurance Company

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